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COURT OF CRIMINAL APPEALS
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IN THE

TEXAS COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

WILLIAM RHOMER, *APPELLANT/PETITIONER.*

V.

STATE OF TEXAS, *APPELLEE/RESPONDENT*

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS CAUSE NO. 04-15-00817-CR

TRIED IN THE 290TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS
TRIAL CAUSE NO. 2012-CR-9066

APPELLANT'S BRIEF

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ORAL ARGUMENT IS PERMITTED

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JUDGE PRESIDING:
HONORABLE MELISA SKINNER

FOURTH COURT OF APPEALS PANEL:
Sandee Bryan Marion, Chief Justice – authored opinion
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

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STATEMENT OF THE CASE

Appellant was indicted on October 30, 2012 for three separate counts arising out of the same accident that occurred May 2, 2012. The accident[1] was between Appellant's vehicle and Mr. Chavez's motorcycle, resulting in his death. Count I charged Appellant with felony murder and the underlying felony was driving while intoxicated 3rd or more. 1CR36-37. Count II charged Appellant with Intoxication Manslaughter and Count III charged Appellant with manslaughter. 1CR36-37. The indictment contained an enhancement allegation that Appellant had previously been convicted of a felony and a deadly weapon was also alleged. Ultimately, the jury found Appellant guilty of all three counts and assessed punishment for each count at 75 years confinement. The judge abandoned Counts II and III in assessing the punishment and Appellant was sentenced to the 75 years on Count I only.

STATEMENT REGARDING ORAL ARGUMENT

In granting Appellant's Petition for Discretionary Review, this Court has ordered that oral argument will be permitted.

[1] The Fourth Court's opinion incorrectly states that the collision occurred after Appellant turned left onto Nakoma from Colwick: "There is no dispute that on the night of the accident appellant was driving his car on Colwick Street coming from the Coco Beach Bar, a few blocks west of the accident site. Colwick curves into and intersects with Nakoma Drive, and Nakoma has both eastbound and westbound lanes. Travelling from the bar, appellant turned from Colwick into the eastbound lane of Nakoma." *Rhomer v. State*, 522 S.W.3d 13 (Tex. App., 2017). However, Appellant was travelling on Nakoma and never was on Colwick.

PROCEDURAL HISTORY

Appellant was found guilty of murder and sentenced to 75 years in the Texas Department of Criminal Justice. On April 12, 2017 the Fourth Court of Appeals affirmed the conviction. *Rhomer v. State*, 522 S.W.3d 13 (Tex.App.-San Antonio, 2017). Discretionary Review with oral argument was granted by this Court on November 8, 2017.

ISSUES PRESENTED

1. **Did the appellate court, in affirming the trial court's decision to admit the police officer's expert testimony despite the officer acknowledging he had no requisite qualifications in motorcycle accident reconstruction, violate Texas Rule of Evidence 702?**

2. **In relying on *Nenno,* instead of *Kelly,* did the appellate court apply an incorrect standard when determining that an accident reconstruction expert's testimony was reliable even though he applied no scientific theory or testing from that field and he had no qualifications in the field of motorcycle accident reconstruction?**

3. **Should the less rigid *Nenno* standard apply, as opposed to the *Kelly* standard, when an expert in a technical scientific field chooses to not apply any of the scientific testing or theory from that field to a particular case?**

STATEMENT OF RELEVANT FACTS

Mario Negron came across an accident on May 2, 2012 around 3:00 a.m. 3RR89. Mario was driving and his best friend Kenneth was in the vehicle with him. 3RR92. When they turned onto Nakoma, he could see a "car inside the wall", but not "through the wall but it was like rammed into the wall" and he could see the

lights sill on. 3RR92. As he kept driving down Nakoma, he saw metal pieces on the ground and lights flickering off the ground. As he kept travelling, he saw more pieces of a motorcycle all over the street and in his lane of travel as well as on the parking lot to the right. 3RR93-94. As he turned around and stopped, he "saw the guy on the ground." 3RR93. The man's body was contorted and he was breathing heavily. 3RR95. Mario called the police and ambulance. 3RR94.

Mario talked to an officer at the scene, but he was never asked to give a formal statement or to come to the station later to meet with the officers. 3RR112-113. When Mario arrived at the scene, the debris from the accident was all over the road and was not confined to one area. 3RR116. Mario agreed that this portion of the road is very dark and that the intersection is very dark as well. 3RR117-118.

San Antonio Police Officer Sean Graham was dispatched to the intersection of Nakoma and Colwick. 3RR157. When he arrived he observed a vehicle that had ran into a building as well as a motorcycle located in the parking lot. Several people were surrounding a man who was laying on the ground. 3RR159.

Officer Graham did not meet with anyone who had actually witnessed the accident and he did not remember taking down anyone's contact information either. 3RR159. The gentleman laying on the ground was identified as Gilbert Chavez. 3RR160. There was blood around Mr. Chavez and Officer Graham could tell that his leg was broken. 3RR160.

Appellant, who was coming from Coco Beach bar, explained to the officer that Mr. Chavez had come into his lane. 3RR162. Officer Graham wrote the crash report for this accident. 3RR165. It was not his duty to determine what happened, but only to "kind of estimate as to what happened." 3RR165.

Over defense counsel objection, Officer Graham was allowed to give his lay opinion under Rule 701 about how the accident occurred, despite the fact that he provided no background knowledge on accident reconstruction and the fact that he testified that he was only estimating how it happened. 3RR166-167. Officer Graham did not believe Appellant's account of how the accident happened. 3RR167. Defense counsel again re-urged his objection to Officer Graham being qualified to answer questions about the accident and the judge told him to "sit down" if he did not have a specific legal objection that particular question. 3RR168. On cross-examination, defense counsel asked whether "the fact that items may have ended up on one side of the road or the other does not tell us anything about how the accident happened?" and the state's objection to the officer not being qualified to answer that question was sustained. 3RR186.

This particular section of Nakoma had an eastbound lane, a westbound lane, and a center turn lane. 3RR169. Officer Graham noted that if Appellant was driving from Coco Beach toward 281 the debris from the accident was in the opposite side lane. 3RR169-170.

When Officer Graham arrived at the scene there was debris on the road. He believed it would be important to photograph the debris and he could not think of a reason why it would not get photographed as evidence. 3RR185. Officer Graham had no personal knowledge that Appellant caused the accident and he also had no information on whether the motorcycle operator caused the accident. 3RR187.

Two separate toxicology screens were run on Mr. Chavez which revealed he had methamphetamine and Levamisole in his system. The first screen was taken at the hospital while Mr. Chavez was being treating and the second was taken during the autopsy. 3RR256-257. The methamphetamine level was 0.20 milligrams per liter. 3RR257. Dr. Frost, the medical examiner, could not explain what effect this amount of methamphetamine had on Mr. Chavez. 3RR258. Dr. Frost did agree that methamphetamine can be a very dangerous drug that can impair one's ability to operate a motor vehicle. 3RR262-263. Levamisole is commonly used as a cutting agent for cocaine. 3RR266.

San Antonio Police Detective John David Doyle, who worked in the night traffic investigations unit, was dispatched to Nakoma and Colwick on May 2, 2012 along with Detective Holson for an alcohol related serious bodily injury "likely fatality" incident. 3RR288-289.

When he arrived, there was a motorcycle in the parking lot north of the roadway. There was a Mercury Sable in the parking lot that had crashed into the

pillars of the building. 3RR290. Initially, he talked with Officer Graham and determined that there were no witnesses to accident, so he surveyed the scene to determine what kind of evidence there was. 3RR290-291.

Outside the presence of the jury a hearing was held to determine whether Detective Doyle's opinion and theory were admissible. Doyle concluded that "the vehicle driven by the defendant straightened out the curb, hit the motorcycle in…his traffic lane, in the oncoming traffic lane. The motorcyclist was struck by the left front corner of the car. He went over the car and the…motorcycle was pushed backwards into the parking lot." 3RR306. This opinion was based on the debris, locations of the vehicles, and damage to both vehicles. *Id*. By straightened out the curb, Doyle meant that Appellant failed to drive as the road curved and went straight and struck the motorcycle. 3RR308. This theory was based on the tire marks and scrape marks left by the vehicles. 3RR309.

Officer Doyle had never published any literature as an expert in the field of accident reconstruction. 3RR323. His training in this field consisted of a 133-hour course at Lackland Air Force base in 2004 that spanned over 2 and a half weeks. 3RR324. He then took an advanced course in 2010 or 2011. 3RR324. The final course he took was on reconstruction momentum in 2011. *Id*. He had only testified as an expert one time prior. 3RR325.

Doyle agreed that motorcycle accident reconstruction is different than vehicle accident reconstruction. However, he had no training or any specialized education with regard to motorcycle reconstruction. 3RR327. He had never testified as expert in a case involving motorcycle reconstruction. 3RR327. Doyle admitted that he did not apply any scientific theory to this case. 3RR331.

Based on Doyle's testimony, defense counsel objected that Doyle was not qualified to testify as an expert in this case. 3RR337-339. The judge, however, allowed Doyle to testify as an expert. 3RR347. The judge did not make specific findings on what qualified Doyle as an expert and she only cited Doyle's testimony that he would not do a speed calculation. Thus, Doyle did not apply any science in this case at all.

The following day, defense counsel again objected outside the presence of the jury that Doyle was not qualified to provide testimony under Rules 701 or 702. 4RR4-5.

In front of the jury Doyle explained that once he arrived at the scene he conducted a visual inspection and then painted markings in order to highlight areas for mapping the scene. 4RR6-8. Doyle testified that he was able to determine the area of impact by looking at the debris field and where the tire marks left the area and where the vehicles eventually stopped. 4RR11. Doyle painted the scene in order to take scaled measurements. 4RR13. The ultimate goal of doing the scaled diagram

is to determine the speeds of the vehicles and a momentum analysis. *Id*. However, he could not do speed calculations or momentum analysis in this case because the weight differential of the vehicle versus the motorcycle and also because the vehicle struck a building. 4RR14. Doyle conducted a demonstration for the jury on how his Sokkia equipment takes measurements of a scene.

After Doyle used the Sokkia to take photographs of the accident scene, he downloaded the images, and then drew a scaled diagram. 4RR20; State Exhibit 31. Doyle formed the opinion that Appellant "failed to negotiate the curve. He basically straightened out the curve…And he came into the path of…the motorcyclist who is going this way, the complainant, and hit him head-on, more or less." 4RR52. He based this opinion on the debris; the tire marks; the curb strikes; the final resting position of the motorcycle, vehicle, and body; and the curve in the road. 4RR23-24.

Defense counsel made a speculation objection that Doyle could not say that Mr. Chavez never came into Appellant's lane of travel, but this objection was overruled. 4RR63. Doyle explained that based on where the impact was, Mr. Chavez never left his westbound lane to enter Appellant's eastbound lane of travel. 4RR64. However, on cross-examination, Doyle agreed that he could only tell the jury where the area of impact was located. 4RR122.

Appellant allegedly told officers at the scene that Mr. Chavez came from behind him and he hit him on his right. But, Doyle disagreed that this was a

possibility. 4RR65. Doyle did not examine any debris in Appellant's lane of travel. 4RR66. Doyle believed that Appellant's inability to negotiate the curve was common with alcohol impairment. 4RR66.

Doyle also expressed an opinion that there was no evidence that Mr. Chavez was impaired because he was in his own lane of travel. 4RR67. Doyle concluded that based on the evidence, Appellant caused the accident "due to impairment" and due "to alcohol intoxication". 4RR68.

Doyle agreed that Mr. Chavez had meth in his system at the time of the accident and meth is a drug that one should not be using while operating a motor vehicle. 4RR71. Doyle did not learn of Mr. Chavez being on meth until this case was set for pretrial. 4RR72.

Doyle's education included a degree in Administrative Management and he started premed so he had some general chemistry and biology background. 4RR73. He attended four classes with the police department for a total 501 hours of accident reconstruction training. 4RR73. He had no training in motorcycle accident reconstruction. 4RR73. Doyle agreed that he did not know the basis of motorcycle accident reconstruction. He stated, "I don't know the exact basis of it since I have never been to class." 4RR74. He also agreed that there was "different physics, different science, different mathematical principles" between vehicle on vehicle accidents versus a vehicle and a motorcycle. 4RR74. Doyle admitted that the Sokkia

that he used was just a measuring tool, it did not explain how things occurred in an accident, and it did not provide any science or method on how the accident occurred. 4RR75-76.

The actual report that was generated in this case was generated by Doyle's partner, Officer Holson, who was retired at the time of trial. 4RR77. At the time that Doyle arrived to begin his work on the scene, the EMT's and other medical personnel had already left. Doyle did not know where they had parked when they were there and it was possible that they "trounced" through the scene. 4RR80. He also agreed that medical personnel are not concerned with crime scene preservation because they are focused on the patients. 4RR84. He also noted that it is "common" for medical personnel to move debris around and for them "to stack debris." 4RR84. But, he had no knowledge of whether that happened in this case. *Id*. Doyle agreed that the crime scene preservation with regard to the photographs was "crappy". 4RR94. There were no photos of the area of impact, but Doyle agreed that those would have been important. 4RR99. According to Doyle's diagram of the accident, the point of impact was closer to the center lane than to the curb. 4RR98. However, better photographs would have given the "jury a much more precise an exacting location of where this diagram is suggesting the impact was". 4RR99. There were no photos of the debris field. 4RR100. In Doyle's opinion, there were no "appropriate photos". 4RR101.

Doyle also relied on the curb strikes for his analysis, but, “unfortunately”, there were no photos of those either. 4RR108.

The area where the accident occurred is sloped and Mr. Chavez would have been travelling downhill and into a curve. 4RR116-117. Doyle disagreed that before the accident Mr. Chavez was in the wrong lane of travel because there were no tire marks indicating that he was. 4RR124-125.

Within 30 minutes of being at the scene Doyle already reached his conclusion on how this accident occurred. 4RR131.

During closing, the State emphasized Doyle as an “expert” and argued: “Let's talk about who caused this crash. The opinion of John Doyle is not just an opinion. The opinion of John Doyle is an expert opinion based on training and experience for the last 26 years.” 6RR57. The State continued its argument: “Let's talk about the crash itself. John Doyle came in here and told you that it is, in his opinion, his expert opinion based on his training and experience that this Defendant…straightens out that curve. He fails to negotiate it.” 6RR58.

The State also emphasized Doyle’s testimony in terms of the laws of physics, despite him testifying that he did not know the physics, math, or science of motorcycle reconstruction: “Let's go over some of the testimony that is contained in the jury charge going to causation. The Defendant claimed that Gilbert Chavez came into his lane. Remember Detective Doyle's testimony about how – what happens to

a motorcycle rider when he hits a car. He continues going in the same direction that he was already going. It's that basic law of physics. An object in motion will stay in motion." 6RR22.

Finally, the State argued that Appellant's theory of how the accident occurred was not plausible merely because Doyle said it was not plausible: "There is no evidence to suggest that the motorcycle was on any other lane of the highway except for his, and we know that because of this right here, because of what John Doyle tells you." 6RR62.

SUMMARY OF THE ARGUMENT

Appellant argues in Issues One that the Fourth Court of Appeals errored in finding that Detective Doyle, who admitted that he had no training or experience in motorcycle accident reconstruction and who admitted that he did not know the physics, the science, or mathematical principles of motorcycle accident reconstruction, was qualified to render expert opinion on how the accident occurred in this case. Doyle testified that he had training in accident reconstruction involving vehicle on vehicle accidents as well as accidents involving vehicles and pedestrians. However, he did not have any education, experience, knowledge, skill, or training to conduct accident reconstruction in cases, such as this case, involving a motorcycle. Detective Doyle even agreed that the physics, the science, and mathematical principles were all different than reconstructing a motor vehicle

accident. 4RR74. Doyle also testified that he did not apply any scientific theory to reconstruct this accident.

In Issue Two, Appellant argues that the Fourth Court of Appeals, in applying the less rigid *Nenno* standard to whether Doyle's testimony was reliable, as opposed to the *Kelly* standard, was error because accident reconstruction involves hard sciences and *Nenno* is applied in cases involving social science, or soft sciences. The Fourth Court noted a split in authority amongst the appellate courts that should be resolved by this Court.

In Issue Three Appellant similarly complains that the *Nenno* standard should not apply to an expert witness in a field of hard sciences simply because the witness chose to not apply any of the science from the given field.

ARGUMENT AND AUTHORITIES

I. Did the appellate court, in affirming the trial court's decision to admit the police officer's expert testimony despite the officer acknowledging he had no requisite qualifications in motorcycle accident reconstruction, violate Texas Rule of Evidence 702?

II. In relying on *Nenno*, instead of *Kelly*, did the appellate court apply an incorrect standard when determining that an accident reconstruction expert's testimony was reliable even though he applied no scientific theory or testing from that field and he had no qualifications in the field of motorcycle accident reconstruction?

III. Should the less rigid *Nenno* standard apply, as opposed to the *Kelly* standard, when an expert in a technical scientific field chooses to not

apply any of the scientific testing or theory from that field to a particular case?[2]

a. Standard of Review

The standard of review of a court's decision to admit or exclude expert testimony is for an abuse of discretion. *Kelly v. State*, 824 S.W.2d 568, 574 (Tex.Crim.App.1992). A court abuses its discretion to admit or deny evidence when it rules "without reference to any guiding rules and principles. Another way of stating the test is whether the act was arbitrary or unreasonable." *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990), *on reh'g* (June 19, 1991).

As a guide to determining whether a trial court abused its discretion in qualifying a witness as an expert, a reviewing appellate court should consider: "(1) is the field of expertise complex?; (2) how conclusive is the expert's opinion?; and (3) how central is the area of expertise to the resolution of the lawsuit?" *Vela* at 131 (internal citations omitted).

b. Admissibility of Expert Testimony

The Texas Rules of Evidence, namely Rules 104(a), 401, 402, and 702, govern the admissibility of expert testimony during trial. "Rule 702 states: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

[2] Each ground for review relies on the same facts and similar legal analysis, thus they will be briefed together.

knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *Vela v. State*, 209 S.W.3d 128, 130-31 (Tex. Crim. App. 2006)(internal citations omitted).

Before a trial court may admit expert testimony, three separate inquiries must be established: "(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case. These conditions are commonly referred to as (1) qualification, (2) reliability, and (3) relevance." *Vela* at 131(internal citations omitted).

Texas Rule of Evidence 702 allows a witness to provide expert testimony if it assists the jury understand the evidence or determine a fact in issue. "'Unreliable ... scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts.' K. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier With the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence*, 32 Ariz.L.Rev. 915, 941–942 (1990)." *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992).

Essentially, Texas Rule of Evidence 702 allows expert testimony only if it helps the jury understand the evidence or determine a fact in issue if that expertise

is outside the training and experience of the average juror. TEX. R. EVID. 702; *Naivar v. State,* No. 12-02-00171-CR, 2004 WL 1192691, at *3-4 (Tex. App.—Tyler, May 28, 2004). "[T]he threshold determination for admitting expert testimony is whether such testimony if believed, will assist the untrained layman trier of fact to understand the evidence or determine a fact in issue." *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993) (internal citations omitted).

c. Experts in the Field of Accident Reconstruction

Accident reconstruction is a highly specialized and technical field of expertise that requires an individual to have a high level of skill, training, knowledge, experience, and education before rendering an opinion. "In deciding if an expert is qualified, trial courts 'must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.' *Helena Chem'l Co.,* 47 S.W.3d at 499, citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719 (Tex.1998)." *DeLarue v. State*, 102 S.W.3d 388, 396 (Tex. App—Houst. [14th Dist.] 2003). "Accident analysts and reconstruction experts may be qualified to testify as to the cause of an accident if they are highly trained in the science of which they testify. *Lopez v. Southern Pac. Transp. Co.*, 847 S.W.2d 330, 334 (Tex.App.-El Paso 1993, no writ); *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 483 (Tex.App.-Corpus Christi 1990, writ denied)." *Id*.

A police officer, with no specialized training in accident reconstruction, is not qualified to render an expert opinion. "However, police officers are qualified to testify regarding accident reconstruction if they are trained in the science about which they will testify and possess the high degree of knowledge sufficient to qualify as an expert." *DeLarue* at 396.

d. Detective Doyle Lacked Qualifications as an Expert in Motorcycle Accident Reconstruction

According to Doyle, accident reconstruction is based on hard sciences that rely on math, physics and scientific principles. 3RR278-279. When Doyle was asked what "reconstruction" was, he replied: "It's the finishing part of – of momentum. You go further into momentum and you get into areas where you can actually check the momentum that you do…Force vectors, that kind of things." 3RR278. In determining the "area of impact", Doyle explained when it's "two cars that are crashing, there's typically a gouge mark. With a motorcycle and a car like this, you don't have that because the motorcycle kind of scoops up the – is scooped up by the car." 3RR11. Despite explaining that a motorcycle would get "scooped" and "redirected", but not knowing the physics, math, or science of how this could occur, Doyle still testified to the "area of impact" which was the central issue in this case.

In 2003 or 2004, Doyle attended a 133-hour intermediate course on accident reconstruction that spanned over two and a half weeks. 3RR275; 3RR324. This course was solely about the basics of accident reconstruction. He then attended an

80-hour advanced course in 2010 or 2011. 3RR276; 3RR324. Finally, he attended a pedestrian course in, he believed, 2011. 3RR275; 3RR324. "Those three courses give you the ability to reconstruct a scene based on speed calculations or energy calculations." 3RR276. Thus, Doyle's training and experience n reconstructing an accident centered around conducting speed or energy calculations—two things he did not do in reconstructing this accident.

In addition to these courses, Doyle had responded to roughly 700-1000 crashes as a detective; although he did not indicate how many he reconstructed. 3RR287. Initially, he told the prosecutor he had been qualified as an expert on a "few occasions", but then on cross-examination admitted he had only testified as an expert on one prior occasion. 3RR288; 2RR325. He has only testified as an expert in Bexar County. 3RR288. The only other case that he testified as an expert involved vehicles and did not involve any motorcycles. 3RR326-327.

The tool that Doyle used, the Sokkia, was only used to measure the scene and there was no science involved in using the device. 3RR321-322. In fact, Doyle agreed that he did not apply any scientific theory in this case at all. 3RR331. Thus, he did not do any speed or energy calculation to reconstruct this accident. *See Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993) (internal citations omitted) ["[T]he threshold determination for admitting expert testimony is whether such

testimony if believed, will assist the untrained layman trier of fact to understand the evidence or determine a fact in issue."]

Doyle agreed that motorcycle reconstruction was different from reconstructing a scene involving only vehicles. 3RR327. Doyle did, however, opine that a motorcycle accident is similar, but not the same, as an accident involving a pedestrian. *Id*. He had no training or special education involving motorcycle accident reconstruction and he had never provided expert testimony on a case involving motorcycles. 3RR327. Specifically, he acknowledged that there were differences in vehicle versus motorcycle accidents and he acknowledged that he was not trained and had no experience with motorcycle accidents. Doyle agreed that he did not know the basics of motorcycle accident reconstruction and he further agreed that there were "different physics, different science, different mathematical principles" between vehicle on vehicle accidents versus a vehicle and a motorcycle. 4RR74.

Aside from passing a few courses, Doyle did not hold any special certifications or degrees in accident reconstruction. There is nothing in the record that established how many of the 700-1000 accident scenes that he went to were reconstructed by him. He had also not published any articles in this field.

Ultimately, however, the trial judge ruled that that Doyle could testify and give his opinion on how the accident occurred because, based on his training and experience, he was sure of how the accident happened. 3RR347. Despite admitting

that he had no training in reconstructing a motorcycle accident, the appellate court affirmed the trial court's decision to admit Doyle's testimony explaining how the accident occurred.

> "Although Doyle admitted he had not taken any accident reconstruction course that involved motorcycles and he admitted different physics/scientific/mathematical principles were involved, Doyle also testified motorcycle reconstruction was somewhat similar to a reconstruction involving pedal cyclists because the heightened center of gravity of the riders 'is very similar.' He also stated, 'there are distinct similarities' between a car/motorcycle collision and a car/bicycle collision, and he had received training in bicycle and pedestrian crashes. This accident involved only two vehicles, one hitting the other, and the disputed issue was in which lane the accident occurred—Chavez's lane or appellant's lane.[3]" *Rhomer v. State*, 522 SW.3d 13 (Tex. App.—San Antonio, 2017)

The Fourth Court also relied on Doyle's "practical experience and specialized training to measure the accident scene using a Sokkia instrument; create a scaled diagram showing all tire marks, curb strikes, curvature of the road, and debris; and identify the debris left by the motorcycle and the car, and the damage to the motorcycle and Chavez's body." None of this practical experience involved science. Quite simply, this "practical experience" involved just identifying objects, measuring them, and drawing them.

[3] This summary of the issue in the case is not entirely accurate. While which lane the accident happened in was important, *how* the accident happened, including who caused it, was the disputed issue.

The Fourth Court relied on Doyle's assessment that a motorcycle accident was similar to pedestrian/bicycle accidents, despite the fact that he was not trained in motorcycle accidents to make that comparison. Doyle's testimony also relied on the fact that a vehicle would pick up and move a motorcycle to another area, yet, without any training in this field, testified where the area of impact was based on the debris field.

Doyle's statement that motorcycle accidents are similar to pedestrian/bicycle accidents is as reliable as an expert in criminal law testifying that criminal procedure is similar to civil procedure simply because they both rely on law and rules. To make such a comparison, one would have to be familiar in both subjects in order to explain their similarities and differences. Having training and experience in one field of study does not make you an expert in every sub-category of that particular field. This line of reasoning is supported by the Texas Supreme Court as well as the Fifth Circuit. In *Broders v. Heise*, the Texas Supreme Court disagreed that a medical doctor "was qualified as an expert merely because he is a medical doctor." *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). The complaining party in that case argued that the doctor's testimony was admissible "because he and the defendant doctors are of the same school of practice, that is, they are all medical doctors." *Id.* The Supreme Court rejected this line of reasoning and supported its holding with federal court analysis on the same issue:

> "Federal courts have reached similar results in decisions interpreting Federal Rule of Evidence 702. The Fifth Circuit, for instance, has focused, as we do, on whether the expert's expertise goes to the very matter on which he or she is to give an opinion. In *Christophersen v. Allied–Signal Corporation*, 939 F.2d 1106, 1112–1113 (5th Cir.1991), *cert. denied*, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992), the court noted:
>
> > The questions ... do not stop if the expert has an M.D. degree. That alone is not enough to qualify him to give an opinion on every conceivable medical question. This is because the inquiry must be into actual qualification...."
>
> *Broders v. Heise,* 924 S.W.2d 148, 153 (Tex. 1996).

According to Doyle's own testimony, his education qualified him to conduct speed and energy calculations, but he was not trained in the math, science, or physics involving motorcycle accidents. He admitted that there were differences in motorcycle reconstruction and admitted that he did not have any experience with motorcycles. Without knowing what the "different physics, different science, different mathematical principles" between vehicle on vehicle accidents versus a vehicle and a motorcycle (4RR74), Doyle provided the jury with an opinion that was not based on any scientific theory by an officer who lacked any skill, knowledge, education, experience or training in the field of motorcycle accident reconstruction.

e. Doyle's Testimony on Motorcycle Accident Reconstruction Was Not Reliable

Applying the law on expert qualifications to the case at hand, Doyle's expert witness testimony was not admissible under Rule 702 because his opinion on how the accident occurred applied no scientific principles, but merely reviewed the scene

and then gave the ultimate conclusion that Petitioner caused the accident. "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." *Vela v. State,* 209 S.W.3d 128, 134–35 (Tex. Crim. App. 2006).

This Court has already found that whether *Kelly* or *Nenno* applies, "reliability should be evaluated by reference to the standards applicable to the particular professional field in question." *Coble v. State*, 330 S.W.3d 253, 273–74 (Tex. Crim. App. 2010).

Detective Doyle candidly admitted that he applied no scientific theory to reconstruct the accident and he also admitted that had no training in motorcycle accident reconstruction. Thus, in addition to not meeting the proper qualifications, any opinion that he did provide the jury was not reliable. "Scientific evidence which is not grounded 'in the methods and procedures of science' is no more than 'subjective belief or unsupported speculation.' Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998).

If Doyle had proper training in motorcycle accident reconstruction, then his opinion that a speed analysis or any other scientific analysis was not necessary would have been reliable. However, considering he did not know the basic science, math, or physics to reconstruct a motorcycle accident, then his opinion on what should and should not have been done to reconstruct this accident should not be relied on.

Evidence that is not reliable must be excluded during trial. "Focusing on the reliability factor, we noted that unreliable scientific evidence is not helpful to the jury because it frustrates rather than promotes intelligent evaluation of the facts. To be considered reliable, evidence based on scientific theory must satisfy three specific criteria pertaining to its validity and application." *Jordan v. State*, 928 S.W.2d 550, 554 (Tex. Crim. App. 1996). In footnote 5 the court noted: "The following three criteria must be established to show reliability: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question." *Id*. Doyle did not apply any scientific theory in this case, thus he did not satisfy all three prongs.

Doyle's "expert" testimony did nothing to assist the jury in determining how the accident occurred in this case—his testimony merely told the jury how it happened, but without applying any scientific principles. Thus, his expert testimony was not reliable. Because the opinion was not reliable, it was an abuse of discretion to admit the testimony.

f. *Nenno v. Kelly* in Accident Reconstruction—*Kelly* Standard Applies to Accident Reconstruction

The Fourth Court of Appeals found that the *Nenno*[4] standard, as opposed to the *Kelly*[5] standard, applied in this case because Doyle did not conduct a speed analysis and his opinion "was based on his experience and training." *Rhomer* at 23. This conclusion from the lower court in this case is more akin to a police officer providing testimony based on his training and experience as an officer, which does not qualify him as an expert in accident reconstruction. *See DeLarue* at 396. His lay opinion on *how* the accident happened is pure speculation without any qualifications to support that testimony.

Although it found that in the context of this accident, the *Nenno* test should apply, the Fourth Court noted that there was a split in authority on which test, *Kelly* or *Nenno*, should apply when speed is an issue. *Rhomer* at 23 ["When a scientific inquiry such as speed is a disputed issue, appellate courts in this state are not consistent. Some courts have applied *Kelly*. *See Wooten v. State*, 267 S.W.3d 289, 303-04 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) ('Officer Tippy's testimony addressed the three criteria of the *Kelly* test in explaining how he calculated appellant's speed by using a drag sled.'); *Pena v. State*, 155 S.W.3d 238, 246 (Tex. App.—El Paso 2004, no pet.) ('testimony concerning the speed at which Appellant was driving at the time of impact, is a type of scientific evidence subject

[4] *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) *overruled by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).
[5] *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992).

to *Kelly* requirements for admissibility'); *DeLarue*, 102 S.W.3d at 398. On the other hand, at least one court has applied both the *Kelly* test and the *Nenno* test when speed was an issue. *See Chavers*, 991 S.W.2d at 460."]

However, this Court has already "explained that 'hard' sciences are those 'areas in which precise measurement, calculation, and prediction are generally possible, includ[ing] mathematics, physical science, earth science, and life science,' while 'soft' sciences 'are generally thought to include such fields as *psychology*, economics, political science, anthropology, and sociology.' *Weatherred*, 15 S.W.3d at 542 n. 5 (emphasis added)." *Chavarria v. State*, 307 S.W.3d 386, 390 (Tex. App.—San Antonio, 2009). The Fourth Court applied *Nenno* because "Doyle's accident reconstruction was not dependent upon a scientific inquiry (such as the speed of a vehicle) and was based on his experience and training. As we have already noted, Detective Doyle reached his opinion based on his experience and specialized training." *Rhomer v. State*, 522 S.W.3d 13, 22 (Tex. App. 2017). But, accident reconstruction, even according to Doyle himself, is based on hard sciences. Simply choosing not to apply any science, or worse, not knowing the science in the field, should not change the standard of admissibility of expert testimony.

The Fourth Court's reliance on *Nenno* is also misplaced as it assumed that hard science was not applicable in this case. Doyle did rely on the vehicle scooping

up the motorcycle and redirecting it when determining the area of impact. This analysis seemed to rely on energy/momentum analysis that would require mass and velocity to be calculated.[6] Doyle also relied on the fact that the motorcycle left no tire marks to indicate that it did not leave its lane. Again, however, this would require knowledge that the particular motorcycle would leave markings in that situation.

Thus, there was science that could be used in this case; Doyle just did not use scientific theory or principles because he was unfamiliar with the basics of motorcycle accident reconstruction. *Nenno* found that cases dealing with soft sciences, such as social science or science that is based on training and experience, demands a less rigid analysis than *Kelly*. If a party holds a witness out as an expert in the field of accident reconstruction, which is based on hard sciences, this Court should find that the *Kelly* standard should apply. *Nenno*-type application should not apply just because the expert in a technical/hard sciences field chose not to apply any hard science testing to formulate his opinion. Not applying the science in the particular field, or not knowing the science to know whether or not it should be applied, should not lower the standard of proof that the proponent of the testimony has to meet. Allowing an expert in a scientific field to provide expert testimony when he did not apply the proper science is unreasonable and would, without a doubt, allow flawed expert testimony to go before a jury.

[6] The State even argued in its closing that Doyle applied basic laws of physics.

g. Harm

When a trial court erroneously admits evidence before the jury, it is viewed as non-constitutional error. A non-constitutional error must be disregarded unless it affects a substantial right. TEX. R. APP. P. 44.2 (b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997), *as corrected* (Oct. 3, 1997). In *Kotteakos v. United States*, the Supreme Court explained:

> "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946).

Furthermore, as noted by Chief Justice Dies in *Brown*, the expert testimony on the cause of the accident came from an officer and jurors give more weight to officer's testimony. *Brown's Estate v. Masco Corp.*, 576 S.W.2d 105, 107 (Tex. Civ. App.—Beaumont, 1978), *writ refused NRE* (May 9, 1979). ["A police officer's opinion as to the cause of a traffic accident carries extra weight with the average juror."]

This case, however, is not one of borderline-type cases contemplated by *Kotteakos*. The only evidence that established Appellant was the cause of the accident came from Doyle. Even during closing argument, the state acknowledged this point: “Let’s talk about who caused this crash. The opinion of John Doyle is not just an opinion. The opinion of John Doyle is an expert opinion based on training and experience for the last 26 years.” 6RR57. In addition to being misleading, because Doyle had not been an expert in accident reconstruction for 26 years, it emphasized to the jury that Doyle explained how the accident occurred and that he should be believed.

The State continued its argument: “Let's talk about the crash itself. John Doyle came in here and told you that it is, in his opinion, his expert opinion based on his training and experience…” 6RR58. The State also emphasized Doyle’s testimony in terms of the laws of physics, despite him testifying that he did not know the physics, math, or science of motorcycle reconstruction: “Let's go over some of the testimony that is contained in the jury charge going to causation. The Defendant claimed that Gilbert Chavez came into his lane. Remember Detective Doyle's testimony about how – what happens to a motorcycle rider when he hits a car. He continues going in the same direction that he was already going. It's that basic law of physics. An object in motion will stay in motion.” 6RR22. Finally, the State argued that Appellant’s theory of how the accident is not plausible because Doyle said it was not plausible:

"There is no evidence to suggest that the motorcycle was on any other lane of the highway except for his, and we know that because of this right here, because of what John Doyle tells you." 6RR62.

Aside from Doyle, there was no other testimony presented by the state on how this accident was caused or that it was due to Appellant's alcohol intoxication. The only other testimony on who caused the accident came from Officer Graham when he testified that he did not believe Appellant's version of how the accident occurred.

There were no eye witnesses who testified on how the accident occurred. No other individual at the trial gave an opinion on how the accident occurred. Thus, without Doyle's testimony, there was no evidence establishing that Appellant caused this accident—which was a central element of the offense that the state was required to prove. Doyle's testimony was mere opinion because it was not based in science. Lay opinion testimony, without personally witnessing the event, is pure speculation.

CONCLUSION

Applying the three-part inquiry to review a trial court's decision to admit expert testimony to this case, it is clear that the trial court abused its discretion in admitting Doyle's testimony. *See Vela* at 131. First, the field of accident reconstruction is complex. Second, Doyle's testimony was conclusive and he emphasized that the accident occurred the way that he said it did. Third, how the accident happened was a central issue in this case and was an element of the offense

that the state was required to prove beyond a reasonable doubt. But, Doyle lacked qualifications to provide expert testimony on accident reconstruction involving motorcycles.

Moreover, the *Nenno* standard should not be applied to accident reconstruction, which relies on the hard sciences. And, *Nenno* should never be applied simply because a witness did not know, or did not apply, the applicable hard sciences in a given field of expertise.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the Petitioner prays this Court reverse the Fourth Court of Appeals' opinion affirming the conviction and remand Petitioner's case for a new trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically sent to Nathan Morey, nathan.morey@bexar.org, Assistant District Attorney at the Bexar County District Attorney's Office and to the State Prosecuting attorney, P. O. Box 13046 Austin, Texas 78711-3046, on December 26, 2017.

/s/Dayna L. Jones
DAYNA L. JONES

CERTIFICATE OF COMPLIANCE

Pursuant to the Texas Rules of Appellate Procedure, I certify that, according to Microsoft Word's word count, this document contains **8261** words.

/s/Dayna L. Jones
DAYNA L. JONES